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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 663

JULIA OBARTUCH,

Petitioner,

vs.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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MISCELLANEOUS.

Couch: Cyclopedia of Insurance Law, 1937 Suppl. to Vol. 8, p. 162 15

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In an effort to confuse the questions of law presented by the petition for certiorari, respondent devotes most of its brief to a discussion of the testimony in the case, to unwarranted attacks upon the petitioner and her family and to unsupported charges of misstatements of fact by petitioner's counsel. Such of these matters as require an answer will be mentioned in the discussion of the propositions argued in respondent's brief.

I.

Respondent Is Concluded By the Statements of Its Counsel Limiting the Issues For Trial to the Question of Substitution At the Medical Examination and Waiving Its Defense That Frank Obartuch Did Not Knowingly Sign the Application.

Respondent treats the question of waiver of its defenses by limiting the issue for trial to that of substitution as a separate point in its brief. The facts shown by the record on this question were stated in the petition to apprise the Court of the scope of the second question presented in the petition, namely, that under the law of Illinois the defense of a fraudulent substitution for the applicant at the medical examination is barred by the expiration of the contestable period.

The record in this case shows that the trial was had upon the single issue as to the alleged substitution, in accordance with express statements of respondent's counsel so limiting the issues for trial and that at the conclusion of the trial the District Court decided that one issue in respondent's favor (R. 700, 701). Thereafter respondent induced the trial Court to enter findings of fact and conclusions of law predicated upon a defense which had been waived by respondent's counsel. We believe that the case should be reversed upon this showing and we therefore proceed to state the facts concerning this matter which respondent has omitted to state in its purported "full discussion" starting on page 4 of its brief.

Respondent contends that petitioner's counsel initiated the discussion of the scope of the issues at the commencement of the trial. Whether that is so or not, is of no consequence for the real question is as to the position taken on this matter by respondent through its counsel. Respondent's quotations from the record on pages 4 and 5

of its brief are misleading because of omissions of statements made by its counsel. Immediately following the matter quoted, Mr. Bourland, respondent's counsel, expressly limited the issue to the question as to the alleged substitution, in response to a direct question by the Court, as follows:

> "The Court (addressing Mr. Bourland): Is that your understanding, that there is only one issue?
> Mr. Bourland: **Yes, your Honor, the only issue is whether or not they substituted a different person,** * * *." (R. 64.)

Shortly thereafter, Mr. Pearson, one of petitioner's counsel came into the courtroom and was advised that the only issue was the question of the substitution and again respondent's counsel conceded that such was the fact, in response to the Court's statement of that fact (R. 65).

Respondent's contention that its counsel merely indicated that he "was inclined to agree" with petitioner's counsel that it was "immaterial" whether the application bore Frank Obartuch's signature, is wholly misleading due to its deliberate omissions from the record.

Mr. Pearson, counsel for petitioner, during a brief opening statement of the case repeated his understanding that the respondent had limited the issue to the question of substitution and thereby concluded that all other defenses as to the signing of the application were waived. The complete statement in the record on this phase of the case was:

> "Mr. Pearson: * * * I understand now, I not being present at the time, that the company takes the position, that is, the defendant, that **the only question in issue that they now present** is the question as to whether or not there was a substitution of another person in the medical examination. Is that right?
> Mr. Bourland: **That is right.**
> Mr. Pearson: **So that** the question of whether the application bears Mr. Frank Obartuch's signature, and the various exhibits, is not **now** material, * * *." **(R. 66.)**

We believe that any partisan argument attempting to interpret these statements is redundant. Not only did respondent's counsel limit the issue for trial as above set forth, but in his opening statement he expressly waived any defenses attacking signatures to the application and, in particular, as to Frank Obartuch's lack of knowledge of what he was signing. To emphasize respondent's sole reliance on the defense of substitution, its counsel stated that it was immaterial to its defense even though Frank Obartuch "knew what he was signing" if "somebody else took the examination" (R. 66). It is not surprising that the respondent makes no reference in its brief to this statement waiving all defenses other than the alleged substitution. After the trial was had upon the one issue so presented and after the Court had orally decided for the respondent, its counsel submitted a finding, which the Court entered over petitioner's objection that it was not an issue in the case (R. 706), to the effect that *if* Frank Obartuch signed the application, he did not sign the same knowingly (R. 711).

Finally, respondent now says that petitioner's claim of waiver of this defense as to the signing was not made in the trial court, but first discovered in the Court of Appeals. A ready answer is that it was not necessary to advise the trial Court of the statements constituting a waiver which were made in that Court's presence. However, respondent's statement here is untrue. The record shows that petitioner's counsel objected to the findings and conclusions submitted by respondent's counsel, and called the attention of the trial Court to the waiver by respondent of all questions as to the signatures on the application, with which the trial Court agreed and then added:

> "The Court: There is no question about his signature." (R. 705.)

After the Court overruled petitioner's objections to the

findings submitted by respondent, petitioner's counsel again called attention to the limitation of the issue and waiver of all defenses other than that of substitution (R. 706).

It is almost inconceivable that a court would enter such findings and conclusions on defenses expressly waived by the respondent, and that an appellate court on the record showing in this case would conclude, albeit somewhat hesitantly, that the "issue as to signing was not waived" by respondent (R. 739). Even though such conclusions might find some support (which we do not concede), the fact remains that counsel for the petitioner tried the case on a single issue in reliance upon statements of respondent's counsel to which the trial Court acceded, and then at the conclusion of the trial they were confronted with findings of fact and conclusions on issues which they had reason to believe not to be involved in the trial.

In this respect we submit that petitioner did not have a fair trial and that the judgments below amount to a denial of due process of law sufficient to warrant reversal by this Court.

II.

The Admission of Rubens' Testimony Denying the Facts Certified by Him in the Policy Cannot be Justified by Mere Statements or Inferences That He Was Induced to Execute Such Certification by Deception and Misrepresentation.

Respondent seeks to excuse its failure to sustain its burden of proving that its examiner Rubens was induced by deception or fraud to execute a certificate, which he testified was false in that he did not see Frank Obartuch sign the application which he certified to as having been signed in his presence. Rubens' testimony is condemned

by the excuse offered by respondent for his alleged conduct, when respondent asserts that it is a common practice of frequent occurrence for signatures to be witnessed "without sufficient assurance that they have been signed by the persons purporting to sign them." (Brief, p. 14.)

The fact is, and there is nothing in this record to the contrary, that no assurance was given or representation made to Rubens that Part 2 of his application was signed by Frank Obartuch. It inevitably follows that Rubens executed his certificate on his own responsibility without any deception or misrepresentation as to the facts stated therein by anyone connected with the insured. Rubens certified to his company and to the insured that the person examined signed the application in his presence and the proof showed, without any contradiction, that the signature was that of Frank Obartuch. Therefore, upon every principle of law and logic it was Frank Obartuch who was examined by Rubens.

The only fraud which the record shows in this situation is the attempt of Rubens to deny the facts which he stated over his signature. The respondent now argues (p. 20) that Rubens did not execute this certificate in Part 2 at the time of the examination and *on the date which he inserted, June 11, 1931,* but that it must have been signed the following day which would be June 12, 1931, because the results of the urinalysis were inserted in Part 3 on that date, although it also is dated by Rubens, June 11, 1931. There is not an iota of evidence to support this supposition. Respondent's desperate attempt to excuse its examiner's "failings" tends to establish the truth in this case more clearly than the evidence in the record.

Respondent's position that it proved that a person other than Frank Obartuch submitted to the examination by

Rubens, consist of the following remarkable "facts" and contentions:

1. Respondent charged under oath that Rubens was deceived by its agent Friedman who falsely represented to Rubens that an unknown person whom Rubens examined was Frank Obartuch (R. 10). Rubens so testified (R. 132) but Friedman, as respondent's witness, denied this alleged fact (R. 333).

2. Rubens certified above his signature in Part 2 of the application, expressly made a part of the policies in suit, that he saw the applicant attach his signature thereto and that before the applicant signed he reviewed the answers which Rubens had inserted (R. 119). Rubens, as a witness, denied that the applicant's signature (admittedly that of Frank Obartuch) was made in his presence (R. 122).

3. Rubens testified that all of the writing on Part 2 (except the signature of Frank Obartuch) and on Part 3 was his handwriting (R. 107). On cross-examination, Rubens testified that after he wrote Part 2 in his handwriting, he left it with the person examined and that he next saw it the following day at the insurance office (R. 130). Since Part 3 was on the reverse side of Part 2 (R. 115) he also left his confidential report with the applicant, in completed form, except for his findings on the examination of a specimen of urine (R. 124), including his unqualified recommendation of the applicant for insurance (R. 117).

4. In the face of these facts and a total absence of any testimony disputing the dates on the applications, respondent contends that Rubens must have executed Parts 2 and 3 of the application on the day following the examination, not on the date he inserted therein, and from this respondent infers (as did the Court of Appeals) that someone (not disclosed) must have represented to Rubens that the signature of the

applicant was that of the person he examined the day before. It follows, contends the respondent, that while Rubens may have been indiscreet, he did not contradict his certificate, but if he did, he is permitted to testify to the "true" facts, because he must have been deceived by some person's representations that the certificate, which supposedly he then executed and dated back, stated the facts (namely, that the person he stated he didn't see sign, but whom he certified he did see sign, was the person he examined and the one who signed the application, but that since Frank Obartuch signed the application, he did not examine Frank Obartuch).

The issue presented in this case cannot be determined as the Courts below have decided it, unless full credence is given not only to the contradictory and incredible statements of Rubens, but also to the unwarranted inferences and suppositions advanced by respondent in its brief.

This somewhat lengthy review of this phase of the case serves to emphasize the soundness of the principles of law applicable to exclude Rubens' testimony. The parol evidence rule was first invoked to render incompetent such testimony and inferences as are here presented by respondent. It should have been applied by the Court of Appeals and its decision holding it inapplicable is in conflict with that of the Fifth Circuit in *New York Life Insurance Co.* v. *Stewart*, 69 F. (2d) 957, upon an analogous state of facts.

Respondent resorts to a legal contention which is as inapplicable to the facts here, as its factual inferences are unwarranted. Respondent says that Rubens' signature to the certificate in Part 2 "was attached merely as a testimonial" and then it invokes the rule that "an attesting witness may always impeach his attestation." Such a contention does violence to the facts in the record and indi-

cates little regard for the Court's comprehension of such facts.

Rubens was not an attesting witness to a document executed by other parties. He was the authorized agent of the respondent who was required as part of his duties to certify certain facts concerning their performance. That certification was printed on a form prepared by respondent for use by one charged with the duty of following its explicit directions. That certification was expressly incorporated as a part of the contract between the parties, in a policy form also prepared by respondent, and thus it became a representation of the facts concerning the signing of the application, not only to the respondent, but also to the insured and his beneficiary, the petitioner here.

The rule of law applicable to such facts is the time-tested rule which prevents a party (and its agent) from contradicting the provisions of a written contract. The rule as to attesting witnesses does not have the slightest application to this situation.

III.

Respondent Cannot Contradict the Record, or Now Limit the Unqualified Introduction of Its Exhibits, in Order to Avoid the Application of the Law of Illinois Precluding Its Impeachment of Its Own Documentary Evidence.

Respondent struggles to avoid the application of the law of Illinois under which the testimony of Rubens impeaching his own statements in Parts 2 and 3 of the application is rendered inadmissible. These parts of the application were offered by respondent and received in evidence as its exhibits 4 (Part 3) and 5 (Part 2).

Respondent contends (a) Part 2 was not respondent's exhibit, the record to the contrary notwithstanding, (b)

Part 3 was not impeached by Rubens, for it was offered to sustain his denial that he examined Frank Obartuch, and (c) the law of Illinois does not preclude a party from impeaching documentary evidence it introduces, for none of the cases cited is well considered and the weight of authority is contra such cases.

Part 2 was offered and received in evidence as Respondent's Exhibit 5. The record so shows (R. 118, 119), the Court of Appeals so held (R. 743) and in that Court the respondent entered into a stipulation (R. 726, 728) directing the clerk to print in the record the following statement, which respondent now implies (p. 19) was improperly inserted in the record by the stenographer or by petitioner's counsel:

> "Defendant's [Respondent's] Exhibits 4 and 5 are respectively part 3 and part 2 of the application of Frank Obartuch, the originals of which are on opposite sides of the same paper. The following are photostatic copies of said Exhibits 4 and 5." (R. 115.)

The record on appeal imports verity; it cannot be contradicted by an affidavit of counsel (*Johnson* v. *United States*, 225 U. S. 405, 411), nor by a certificate of the clerk of the court below outside of the record certified by such clerk (*Hudgins* v. *Kemp*, 18 How. (59 U. S.) 530, 534). Surely, mere statements of counsel in a brief will not suffice to overcome the recitals of the record itself, the statement of the Court of Appeals and counsel's own stipulation in that court.

Mental reservations of counsel concerning their purpose in offering an exhibit or unstated limitations on such offer are likewise ineffective, where the record shows no qualification or limitation of the offer, either when made or at any other time. Respondent's suggestion that it was useless for it to offer the original of Part 2 as its exhibit, since a copy of Part 2 of the application was attached to the policies offered by the petitioner, falls in this category.

Moreover, there is a vast difference between the offer of a complete contract containing a copy of an original document and the original of that document containing the signatures of the parties.

Since Ruben's testimony flatly contradicted his own statement in Part 2, as even the respondent concedes (Brief, pp. 19, 20), the only question is as to the law of Illinois cited by petitioner. Respondent argues, largely upon the ground we did not discuss the Illinois cases cited (for the reason that respondent had not heretofore disputed the Illinois law) that none of the Illinois cases is a well considered opinion, and that there is a conflict of authority, from which respondent assumes that the weight of authority is against these Illinois cases. In passing, we refer to page 11 of the petitioner's brief where we discussed the holding in *Nolan* v. *Barnes,* 268 Ill. 515 at page 521. However, we are not concerned with the question whether the law established by these Illinois decisions is sound or in accord with that in the majority of other jurisdictions, but we do not contend that the law as declared by the highest court of Illinois must be given effect by the Federal Courts in a case removed to such courts from the state courts in Illinois. Such is the principle announced by this Court in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, as we understand it, and as that case has been followed in subsequent decisions of this Court. In *Vandenbark* v. *Owens-Illinois Glass Co.,* 85 L. Ed. (Adv. Ops.) 317, it was held that the Circuit Court of Appeals must apply the state law as declared by the highest court of the state at the time of its decision, even though the decisions of the state court were to the contrary when the case was decided by the District Court. See also, *West* v. *American Telephone & Telegraph Co.,* 85 L. Ed. (Adv. Ops.) 146, where this Court held that the decision of an intermediate appellate state court was binding on the Federal Courts in a case in which jurisdiction rested ex-

clusively on diversity of citizenship, even though the Federal court was of the opinion that the decision of the state court was wrong.

The record also shows that Rubens' testimony contradicted his statements in Part 3 of the application. Respondent asserts the contrary, without discussing the statements which obviously are those impeached, namely, that Ruben was satisfied that the person examined was the person represented in the application (R. 116) and that he had no knowledge of any facts other than those stated which would affect the decision on the application (R. 117). Respondent now states that its purpose in introducing Part 3 was to sustain Rubens' description of the person he examined and that the description in Part 3 as recorded by Rubens during the examination did not correspond with the description of the real Frank Obartuch as given by respondent's witnesses.

In this connection, respondent indulges in some fanciful speculation and in intentionally prejudicial statements that petitioner and her witnesses have an aptitude for perjury, from which respondent deduces that if petitioner had seen Part 3 before its counsel caught petitioner "unawares" by introducing it, her witnesses would have made their description of Frank Obartuch correspond with that in Part 3.

The fact is that petitioner's witnesses described Frank Obartuch as he was described in Part 3, and the alleged discrepancies came from biased and interested witnesses for respondent. Moreover, it was respondent who was surprised in the last analysis, for while even honest witnesses may differ as to the physical characteristics of a person well known to them, the petitioner produced an unimpeachable record containing a description of Frank Obartuch made by government officials long before this controversy was thought of. We refer to the Naturalization Certificate of Frank Obartuch issued by the Circuit Court of the United

States on February 4, 1909, wherein his height is stated as 5 feet 10 inches; color of eyes, brown; and color of hair, brown (R. 442), and we note that the description of the person examined by Rubens, as recorded in Part 3, conforms thereto, except that the height is there recorded as 5 feet 9 inches (R. 116), which may be accounted for by a natural stoop due to the 22 years difference in time of these two records. Again, we justify our extended discussion of this matter as necessary to answer respondent's unjustifiable attempts to prejudice this Court and we submit that respondent is "hoist with its own petard." We cannot refer to each of the prejudicial statements, which are without support or grossly extorted by respondent, but illustrative of all is the concluding statement in respondent's brief, where it asserts that Frank Obartuch "*never* desired to have $20,000 of insurance payable to his widow *from whom he was estranged,*" whereas the record shows that the so-called estrangment (which followed his arrest for beating the petitioner) took place over two years after these policies were issued.

IV.

Under the Law of Illinois the Defense of a Fraudulent Procurement of the Policy by a Substitution for the Applicant at the Medical Examination Is Barred by the Incontestable Clause.

Respondent's argument on this point is limited, as the issue was limited for trial, to the defense of the substitution of a person other than the applicant at the medical examination. Since respondent has reverted to its original position that substitution alone is a complete defense "notwithstanding the incontestable clause", we need not again consider the fact that the issue for trial was limited to this single question. The premise for this particular question

upon the record showing is that the application was made and signed by Frank Obartuch. What then is the effect of the incontestable clause in the policy on the asserted defense that the contract with Frank Obartuch was procured by fraud in that some other person substituted for Frank Obartuch at the medical examination?

Respondent argues this question from a negative viewpoint. It boldly asserts that *all* the decided cases, *all* the text writers and annotators have taken the same view, namely, that the defense of substitution may be presented although the contestable period has expired, and that there is no decided case holding that it makes the slightest difference whether the imposter or the named insured signed the application.

In the first place, in all of the cases cited in the opinion of the Court of Appeals and relied upon by respondent, the imposter not only submitted to the medical examination but actually made the application by forging the insured's name. See *Ludwinska* v. *John Hancock M. L. Ins. Co.*, 317 Pa. 577, where imposter was the sister of an imbecile and signed the imbecile's name to the application; *Maslin* v. *Columbian Nat. Life Ins. Co.*, 3 F. Supp. 368, where the Court stated that the "defense is that an imposter posing as Samuel Maslin made the application"; and the Illinois case cited by respondent, *Valant* v. *Metropolitan Life Ins. Co.*, 302 Ill. App. 196 at page 199, where the question was "whether the incontestable clause can be invoked *where the person making the application* and submitting to the medical examination impersonates another."

The reason given in these cases for the non-applicability of the incontestable clause shows that the forgery of the application by the imposter rather than the substitution of a person other than the named insured at the medical examination is the predicate of these decisions. The reason stated is that no contract with the named insured came into

existence because the insured did not execute the application and hence there is no incontestable clause to apply. This distinction based upon the imposter having signed the application is recognized, contrary to respondent's assertion, in the cases and by text writers and annotators cited by respondent.

In the *Ludwinska* case the Court held that the forgery of the imbecile's signature on the application was the controlling factor. The annotator of the case, in the headnote thereto, and Couch (cited also by respondent) in his Cyclopedia of Insurance Law (1937 Supp. to Vol. 8, p. 162), both view this decision as not being controlled by the impersonation at the medical examination, for each says:

> "If one, or another by his authority, applies for life insurance, the impersonation of him by another in the medical examination is a matter of defense to which the incontestable clause applies."

In the instant case it cannot be disputed upon the record that Frank Obartuch signed the application in two parts, and two amendments thereto on different dates. It follows that the contract so made with Frank Obartuch cannot be contested for fraud in the alleged substitution of another person at the medical examination, where the incontestable clause bars all defenses of fraud in the procurement of such contract after the specified period has rrn. Such is the law of Illinois and the Courts below erred in refusing to follow the law declared by the highest court of Illinois on this proposition. (See cases cited in Petitioner's Brief, p. 15.)

The rule contended for is sound and will preserve the purpose and public policy intended to be effected by the incontestable clause, that of preventing contests by an insurer seeking to defeat its liability, after it has accrued by the insured's death, and where the beneficiary is at a disadvantage to dispute alleged fraud that the insurer has failed to discover within the reasonable period allowed for investigation. Such a rule will not expose insurance

companies to liability upon contracts made with an imposter, for the means of detection are provided by and available to the insurer even after the named insured's death. A mere comparison of the signature on the application with a genuine signature of the named insured will disclose the impersonation, and the incontestable clause will not preclude the defense that the contract is with the imposter who signed the application.

On the other hand, the rule for which respondent contends nullifies the incontestable clause by opening the door to fraudulent contests of liability after the expiration of the contestable period. Under such a rule, liability on any policy can be defeated provided the examiner will, or can be induced to, testify that he did not examine the insured and did not see the applicant attach an admittedly genuine signature to the medical questions and answers, as the respondent's examiner Rubens testified in this case.

Conclusion.

The questions presented by the petition for certiorari are of importance in the law of insurance, and in the application of the rule of *Erie R. Co.* v. *Tompkins*. A clear conflict is shown between the decision of the Court of Appeals in this case and that of the Fifth Circuit Court of Appeals in the *Stewart* case as to an important rule of law, which conflict should be resolved by this Court.

We respectfully submit that the petition for a writ of certiorari should be granted, and that the judgments below should be reversed.

Respectfully submitted,

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